IN THE

Supreme Court of the United States

No. 543, October Term, 1957

KECO INDUSTRIES, INC., and KNAPP BROTHERS MANUFACTURING COMPANY,

Appellants,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS

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Appellee's argument in support of its motion to dismiss is more noteworthy for what it fails to say than for what it says. Appellee does not deny that for more than a year it collected increased rates under authority of the Commission's unlawful and reversed order—rates that were subsequently ordered reduced as required by the judgment of reversal. Nor does appellee deny that under the decision of the Supreme Court of Ohio appellants are now without any remedy, administrative or judicial, for the recovery of the excess in rates appellee was able to collect until the unlawful order was reversed and the rates ordered reduced. Nor does appellee deny that the money its customers were illegally compelled to pay is now held and will be retained by appellee as a windfall unless the Ohio

statutes abrogating all of the customers' remedies are held to be unconstitutional.

The undenied—and undeniable—facts of this case establish that the Ohio statutes, as construed by the highest court of the state, have operated arbitrarily to take away the money of the customers and give it to the utility. Statutes that have such an effect clearly deprive utility customers of their property without due process of law in violation of the Fourteenth Amendment. Appellee's brief carefully avoids this issue. Instead, appellee argues that the appeal should be dismissed on grounds that are without substance or merit.

1. The Federal Question Was Presented in the Trial Court at the First Opportunity, and It Was, Therefore, Timely Raised.

Appellee concedes that the federal question was specifically raised in the trial court in the third amended petition. (Motion to Dismiss, 4.) It concedes further that the federal question was presented in both the Court of Appeals and the Supreme Court of Ohio. (Motion to Dismiss, 7.) Despite this, appellee argues that the question was not timely raised on the ground that it should have been presented before the trial court sustained the demurrer—or, in other words, that it should have been raised in the second amended petition rather than in the third amended petition.

No authority is cited, and none can be cited, in support of this hair-splitting contention. No court has ever held that a constitutional question must be raised before it becomes an issue in the case. A party is required to raise the question only at that stage of the proceeding in which it first arises. *Missouri ex rel* v. *Gehner, et al*, 281 U. S. 313 (1930). In this case the constitutional question first

arose when the trial court construed the Ohio statutes as depriving appellants of all remedy and sustained the demurrer to the second amended petition. Until then there was no constitutional question in the case. As soon as the constitutional question thus arose, appellants immediately presented it by specific allegations in their third amended petition.

Appellants were not bound to anticipate the trial court's construction of the Ohio public utilities statutes. *Missouri ex rel* v. *Gehner, et al, supra.*[1] As noted in the Jurisdictional Statement (p. 6), no Ohio statute expressly abrogates the right of restitution in this type of case and the Ohio courts had not previously construed the statutes as having such effect. On the contrary, the Supreme Court of Ohio had previously held that Ohio public utilities statutes "in no way withdrew from the courts any of the equitable jurisdiction which they theretofore had." *State ex rel* v. *Court of Appeals,* 104 O. S. 96, 135 N. E. 377 (1922).

The *Gehner* case, which appellee ignores, is squarely in point, except that in that case the constitutional question was not raised until after the decision of the highest court of the state. This Court's decision in the *Gehner* case is summarized in the headnote (281 U. S. 313):

> 1. A judgment of a state supreme court so construing a state statute as to cause it to infringe federal rights is reviewable in this Court even though the

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[1] The quotation from *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (1930), appearing on page 5 of appellee's motion to dismiss, is taken out of context. This quotation does not refer to the time when the constitutional question must be raised, but to the necessity of exhausting state administrative remedies when previous decisions of the highest court of the state had held that none existed. Insofar as the time for raising constitutional questions is concerned, the Court followed the *Gehner* case and held that the question was timely raised when presented by petition for rehearing in the state supreme court, where it appeared that the constitutional question first arose as a result of that court's construction of the statute. (See 281 U. S. 677-8.)

federal question was first presented to the state court by a petition for rehearing which was denied without referring to the federal question, if the construction was one that the party affected could not have anticipated and the federal question was presented by him at the first opportunity.

Counsel for appellee argue that appellants should have anticipated the trial court's construction of the statutes in their second amended petition because such a construction had been urged by appellee in support of the demurrer. Opposing counsel apparently lose sight of the fact that the demurrer and appellee's arguments in support thereof were presented *after* the filing of the second amended petition. Obviously, appellants were in no better position to anticipate appellee's arguments than they were to anticipate the trial court's decision.

None of the cases cited by appellee (Motion to Dismiss, 2, 3) supports its contention that the federal question was not timely raised. These cases merely hold that a federal question presented for the first time in an appellate court is not timely raised when under the facts involved the question should have been raised in the trial court. As appellee admits and as the record unequivocally discloses, the federal question was properly presented in the trial court when it first arose.

2. Alleged Inaccuracies in the Jurisdictional Statement.

Counsel for appellee assert that the Jurisdictional Statement contains "numerous statements" that are "not accurate." (Motion to Dismiss, 9.) There is no basis for this assertion. All of the facts set forth in the Statement of the Case as well as in other portions of the Jurisdictional Statement are fully supported by the pleadings and the record facts in the Rate Case. An examination of appellee's

brief discloses, moreover, that the so-called "inaccuracies" are merely statements that do not conform to appellee's strained interpretation of the facts.

(a) Counsel for appellee first object to our characterization of the rates collected by appellee pending the appeal in the Rate Case as "excessive." Both the pleadings and the record facts of the Rate Case establish that the rates were, in fact, excessive and that they were judicially determined by the Supreme Court of Ohio and the Commission to be excessive. The Supreme Court held that the Commission's original rate order was unlawful because it authorized rates that would have reimbursed Cincinnati Bell for expenses that were not properly allowable under Ohio law. *Cincinnati* v. *P. U. C.*, 161 O. S. 395, 119 N. E. (2d) 619 (1954) (Jurisdictional Statement, App. E, 22a). In compliance with the court's mandate, the Commission ordered the rates reduced so that the erroneously allowed expenses would be eliminated from the Company's rate revenue. *Re Cincinnati & Suburban Bell Tel. Co.*, 5 P. U. R. (3d) 260 (1954). The reduced rates were the maximum rates Cincinnati Bell should have been authorized to collect in the original order. To the extent the rates collected were higher, they were clearly excessive.

It is of no consequence that in reversing the Commission's order, the Supreme Court did not use the word "excessive." The important fact is that the court's judgment specifically required the Commission to take action that necessarily resulted in a reduction in rates. It would be just as illogical to argue that a lower court judgment, which is reversed on the ground that it includes improper elements of damage, is not excessive because it was not characterized as such by the appellate court.

Counsel for appellee argue that the rates fixed by the Commission's original order should not be regarded as excessive because the Commission *might have* approved the

same rates after reversal of the order if there were other factors present that would offset the reductions required by the judgment of reversal. Whether such a practice would be proper under the authorities cited at the top of page 10 of appellee's brief is not only doubtful, but inconsequential; the important fact is that the Commission properly corrected its error by ordering the reduction in rates in compliance with the mandate of the Ohio Supreme Court.

(b) Appellee objects to our statement that the Ohio statutes abrogate all judicial remedies for restitution on the ground that this implies that "restitution is a matter of right." (Motion to Dismiss, 11.) This statement is taken almost verbatim from the opinion of the Supreme Court of Ohio, which states that "the General Assembly . . . has completely abrogated the common-law remedy of restitution in such cases." (Jurisdictional Statement, App. A, 7a.)

The statement in *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301 (1935), that restitution is "not of mere right" and will not be ordered "where the justice of the case does not call for it, nor where the process is set aside for a mere slip" is of no relevance in this case. As the Court points out, this is merely a well recognized exception to the common-law principle of restitution. The exception is aptly illustrated by the *Atlantic Coast Line* case. A rate order of the Interstate Commerce Commission had been set aside because the Commission's report failed to include essential findings, but upon further proceedings the Commission made the requisite findings which justified the same rates that had been fixed in the original order. The situation was, therefore, one where the order had been set aside for "a mere slip," and the Court accordingly held that restitution should not be granted.

The instant case presents an entirely different situation. The Commission's order was not reversed because of a mere procedural defect, but was reversed on the merits.

The Commission did not fix the same rates after the reversal, but ordered the rates substantially reduced as it was required to do by the judgment of the Supreme Court in order to correct the original error. The rates collected by Cincinnati Bell under the original order were substantially higher than the rates it would have collected had the Commission entered a lawful order, and the excess is, therefore, money "received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." See *Atlantic Coast Line R. Co.* v. *Florida, supra,* at 309. Recovery in this case will require Cincinnati Bell to repay only those sums which the Ohio Supreme Court held it should not have been allowed to collect in the first place.

3. The Authorities Cited in the Jurisdictional Statement Support the Right of Restitution in This Case.

Under the heading "Appellants' Authorities" counsel for appellee apparently contend that there is no right of restitution at common law for the recovery of excessive rates paid under the compulsion of an administrative order subsequently reversed on the merits. This right was expressly recognized in *Atlantic Coast Line R. Co.* v. *Florida,* 295 U. S. 301 (1935), in which Mr. Justice Cardozo stated (295 U. S. at 309):

> Decisions of this court have given recognition to the rule as one of general application that what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error. (Citations omitted.)

The authorities cited in the Jurisdictional Statement (p. 11) fully support appellants' right to restitution in this case. Although counsel for appellee attempt to distinguish

these cases, they involve factual situations substantially identical to the instant case. In each case an administrative agency had entered a rate order that was subsequently found to be erroneous and reversed or set aside on the merits. In each case the utility had, pending review of the Commission's order, collected the rates or charges authorized by the erroneous order. In each case, moreover, the Commission's order had been entered under a statute that did not provide for restitution upon reversal of such order. Yet, in each case the court held that *as a matter of law* the utility must make restitution of any excess in rates that it collected under authority of the reversed order.

The leading authorities on this question are two decisions of this Court:

> *B. & O. R. Co.* v. *United States*, 279 U. S. 781 (1929);
> *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 350 U. S. 332 (1956).

In the *B. & O.* case the Interstate Commerce Commission had ordered the eastern railroads, whose lines terminated on the east side of the Mississippi River, to bear the cost of transferring freight across the river to the western railroads on through shipments. This Court subsequently held that the Commission's order was erroneous and ordered it set aside. During the pendency of the review proceedings the eastern railroads had paid large amounts of transfer charges in compliance with the Commission's erroneous order. Like the Ohio public utilities statutes, the Interstate Commerce Act makes no provision for restitution in such a situation. Nevertheless the Court held that *as a matter of law* the western railroads were obligated to make restitution of all transfer charges paid in compliance with the erroneous order. Mr. Justice Butler stated (279 U. S. at 786):

> The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. . . . *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 219. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, *supra* 145. *Ex parte Lincoln Gas Co.*, 256 U. S. 512, 516. When the erroneous decree was reversed and the invalid order was set aside, *the law raised an obligation against each of the west side roads to make restitution of the payments made by the east side roads in compliance with the order.* And thereupon each of the east side roads became entitled to have the amounts so paid by it together with interest thereon from the dates of such payments at the rate established by the law of the State in which such sums were paid. (Emphasis ours.)

The *Mobile* case is even more similar to the instant case. The Federal Power Commission had refused to set aside a schedule filed under the Natural Gas Act increasing a producer's rate for gas furnished to a distributor under contract. On appeal, the Commission's order was found to be erroneous and was reversed. Pending the appeal the producer had collected $240,000 in excess of its former rate under the authority of the erroneous order. The Natural Gas Act contains no provision for restitution, but this Court held that the utility was obligated *as a matter of law* to restore the amount thus collected. Mr. Justice Harlan, speaking for a unanimous court, stated (350 U. S. 347):

> Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and United is obligated to make restitution of the excess payments. Cf. *Baltimore & Ohio R. Co.* v. *United States*, 279 U. S. 781.

The authorities cited by appellee on page 16 are not in point. None of them involves the question presented by the

instant case—the right of restitution upon reversal of an administrative order increasing rates. On the contrary, each of these cases involved an action to recover rates that had been collected under a *valid* and *unreversed* order of an administrative agency.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be overruled.

Respectfully submitted,

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